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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91237315
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

AMERICAN MARRIAGE MINISTRIES,)	Opposition No. 91237315
)	
Opposer,)	Mark: GET ORDAINED
)	Application No. 87430729
v.)	
)	
UNIVERSAL LIFE CHURCH)	
MONASTERY STOREHOUSE, INC.)	OPPOSER’S NOTICE OF ERRATA
)	REGARDING ITS REPLY TO
Applicant.)	APPLICANT’S TRIAL BRIEF
)	

Opposer American Marriage Ministries (“AMM”), by and through its counsel of record, files this Errata to correct an inadvertent error in its Opposer’s Reply to Applicant’s Trial Brief (“AMM’s Reply”), 96 TTABVUE 1-27, filed on September 14, 2021. The Table of Contents and Table of Authorities in AMM’s Reply (96 TTABVUE 3-5) did not reflect the correct pagination or complete list of authorities contained within AMM’s Reply. AMM therefore submits, alongside this Errata, an amended reply brief containing a corrected Table of Contents and Table of Authorities.

Dated: September 17, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2021, I served the foregoing Opposer's Notice of Errata Regarding Its Reply to Applicant's Trial Brief by emailing to Applicant as follows:

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OPPOSER’S REPLY TO APPLICANT’S TRIAL BRIEF

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I. INTRODUCTION

Applicant's trial brief is an exercise in misdirection and evidence-dodging. Faced with a record full of evidence that prospective ministers, ordained ministers, news media, wedding industry providers, other ordination providers, and even Applicant itself all use the claimed mark "GET ORDAINED" generically or descriptively in conjunction with ordination services, Applicant seeks to exclude much of this evidence, proceeds to ignore most of the rest of it, and then tries to redirect the Board with irrelevant evidence of other marks and misstatements of the legal tests for distinctiveness.

Notably, Applicant's principal evidence in this proceeding is not evidence illustrating the strength of the claimed mark in identifying Applicant, but rather, evidence that other marks incorporating the generic word "get" have managed to achieve registration. Applicant offers no evidence showing that the mark in question is actually distinctive for the claimed services, but instead relies solely on carefully scripted testimony that "GET ORDAINED" does not literally name the class of services that Applicant provides. Throughout its brief, Applicant carefully focuses on the semantic issue of whether the phrase "GET ORDAINED" describes a service that a service provider can offer or whether it describes an "action undertaken by" an individual (for instance, by obtaining a service from a service provider). But Applicant offers no law suggesting any relevance to this narrow distinction, and case law in fact shows that no such distinction is warranted. Because an individual can "get ordained" by availing themselves of the ordination services provided by an ordination service provider, the phrase "GET ORDAINED" is necessarily generic or descriptive of the ordination services provided. "GET ORDAINED" does not and cannot function as a trademark for Applicant for the claimed services, and registration must be denied.

II. PRELIMINARY MATTERS

A. Applicant Waived All Its Affirmative Defenses.

Affirmative defenses not pursued at trial or in a party's trial brief are deemed waived. *See* TBMP § 801.1; *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 U.S.P.Q.2d 1419, 1422 (TTAB 2014) (pleaded affirmative defenses not pursued in the brief considered waived); *Research in Motion Ltd. v. Defining Presence Marketing Group Inc.*, 102 U.S.P.Q.2d 1187, 1189-90 (TTAB 2012) (affirmative defenses not pursued at trial considered waived). Applicant presented no evidence or argument as to any the affirmative defenses pled in its Answer, *compare* 4 TTABVUE 6 and 95 TTABVUE, so each of Applicant's affirmative defenses must be considered waived.

B. Applicant's Evidentiary Objections Are Legally and Factually Unsound

AMM responds to Applicant's evidentiary objections in Appendix A below.

C. Evidence to Which Applicant Maintained No Objection

In its trial brief, Applicant maintained no objections to the evidence submitted with AMM's Notice of Reliance. *See* 95 TTABVUE 36-48. Additionally, although Applicant raised various objections at the testimony deposition of AMM's former Executive Director Dylan Wall, and at the testimony depositions of Applicant's employees George Freeman, Dallas Goschie, and Brian Wozeniak, Applicant did not maintain any of its objections to these witnesses' testimony in its trial brief. *Id.* Accordingly, any objections to these witnesses' testimony was waived. *Hard Rock Café International (USA) Inc. v. Elsea*, 56 U.S.P.Q.2d 1504, 1507 n.5 (TTAB 2000) (objection to exhibit raised during deposition but not maintained in brief deemed waived); *Reflange Inc. v. R-Con International*, 17 U.S.P.Q.2d 1124, 1125 n.4 (TTAB 1990) (objection to testimony and exhibits made during depositions deemed waived where neither party raised any objection to specific evidence in its brief).

AMM acknowledges that Applicant maintained objections to certain exhibits introduced at Mr. Wall's deposition. Applicant's objections to these exhibits are not legally or factually sound (*see infra* Appendix A), but even if the Board excluded the exhibits themselves, the Board

may consider Mr. Wall's general testimony about issues such as his knowledge of the ordination industry, his use and understanding of "GET ORDAINED," and his awareness of AMM's use and third-party uses of "GET ORDAINED," *see, e.g.*, 69 TTABVUE 20-38, as Applicant waived any objection to such testimony.

D. Applicant Late-Submitted New Evidence of Record

After AMM submitted its trial brief, Applicant submitted three new testimony depositions into the trial record. *See* 90 TTABVUE (Dylan Wall deposition dated December 10, 2020), 91 TTABVUE (Lewis King deposition dated December 7, 2020), 93 TTABVUE (Glen Yoshioka deposition dated December 7, 2020). Notwithstanding Applicant's late submission of this testimony, which deprived AMM of an opportunity to address this evidence in its main brief, AMM treats these testimony depositions as evidence of record. It notes, however, that the cover page of Mr. Wall's deposition (at 90 TTABVUE 2) incorrectly identifies the deposition as a combined 30(b)(6) deposition of AMM and personal deposition of Mr. Wall; Mr. Wall's deposition was actually noticed and taken solely as a personal testimony deposition. AMM further observes that Applicant does not identify or maintain in its trial brief any objections to the testimony offered by Lewis King, Glen Yoshioka, or Dylan Wall at these depositions.

III. ARGUMENT

A. Genericness Must Be Evaluated Based on Understanding of the Words and Phrase in the Claimed Context

"To determine whether a term [is] generic, we look to whether consumers understand the word to refer only to a particular producer's goods or whether the consumer understands the word to refer to the goods themselves." *Yellow Cab Co. v. Yellow Cab of Elk Grove, Inc.*, 419 F.3d 925, 929 (9th Cir. 2005); *see also J & J Snack Foods Corp. v. Nestle USA, Inc.*, 149 F. Supp. 2d 136, 146 (D.N.J. 2001) (a mark is generic if it is in the class of terms which "so directly signify the nature of the product that interests in competition demand that other producers be able to use them.").

While the distinctiveness inquiry ultimately considers the impression conveyed by the mark as a whole, the inquiry may begin by analysis of the separate components of the mark. *Advertise.com, Inc. v. AOL Advert., Inc.*, 616 F.3d 974, 977 (9th Cir. 2010). Applicant does not contest that the verb “ordain” can be conjugated as “ordained” or “ordaining,” or that these are the verbal correlates of the noun “ordination.” 73 TTABVUE 10:21-24 (King: “‘Get ordained’ is a verb describing the act of ordination.”). Thus, “ordained” is a generic word for “ordaining” (as in “ordaining ministers,” one of Applicant’s claimed services, *see* 39 TTABVUE 33) or for “ordination.” The word “get,” meanwhile, has a number of relatively synonymous definitions, largely variations on the generic phrase “to obtain.” *See* 40 TTABVUE 3; 79 TTABVUE 27. Taken separately, “get” and “ordained” reflect nothing beyond the genus of services offered by Applicant: the service of “ordaining.” *See* 39 TTABVUE 33; *see also* 95 TTABVUE 15 (identifying “online ordination services” as a common name for Applicant’s claimed services).

In this case, combining the words does not elevate the distinctiveness of the separate words, and the compound thus created is itself generic.¹ *In re Christian Happenings Acquisition Corp.*, 2013 TTAB LEXIS 17, *9 (TTAB Jan. 25, 2013) (explaining that the prefix “I” and word “ticket” retained their common meanings when combined, and that the public would readily understand the claimed mark to refer to applicant’s online ticket services (citing *In re Gould Paper Corp.*, 834 F.2d 1017, 5 U.S.P.Q.2d 1110, 1112 (Fed. Cir. 1987))). In the relevant context, “get ordained” has a clear meaning that “signif[ies] the nature” of the services offered and which cannot readily be understood to refer to a particular provider’s services, but which instead is reflective of ordination services more generally. *See, e.g.*, 69 TTABVUE 24:20-27:17. This is

¹ Contrary to Applicant’s assertion (*see* 95 TTABVUE 26), the fact that “GET ORDAINED” does not appear as a phrase in the dictionary is not proof that the term is not a commonly used or understood term for a class or category of goods or services. Many common phrases do not appear in the dictionary. The Board can take judicial notice of the fact that other phrases that Applicant concedes are generic names for the category of services at issue, such as “online ordination services” or “ecclesiastical services,” do not appear in the dictionary either. *In Re Uni-Charm Corp.*, No. 85978557, 2016 WL 6136595, at *2 (Sept. 29, 2016) (non-precedential opinion describing the basis for the Board’s decision to judicially notice evidence that a dictionary does not have an entry for a specific term).

true even though “GET ORDAINED” is a verbal phrase rather than a noun, as many generic terms are. *See In re Madetoorder, Inc.*, 2012 TTAB LEXIS 247, *17-*20 (TTAB June 29, 2012) (“[G]enericness does not depend on grammatical constructs, but on the primary significance of the applied-for mark to the relevant public.”); *see also In re Grindmaster Corp.*, 2011 TTAB LEXIS 348, *10 (TTAB Oct. 28, 2011) (the term “grind’n’brew,” used in the manner of a verb that equated to the meaning of the individual words standing alone, indicated generic rather than trademark use).

Applicant attempts to distract the Board from the actual legal issue when it asserts its straw man argument that “GET ORDAINED” has different meanings in different contexts. *E.g.*, 95 TTABVUE p22 (citing 79 TTABBVUE 18)). Claimed phrases are evaluated in the context of the applied-for services. *In re Tower Tech Inc.*, 64 U.S.P.Q.2d 1314, 1316-17 (TTAB 2002) (“[I]t is well-established that the determination of mere descriptiveness of a particular term or phrase must be made not in the abstract or on the basis of guesswork, but in relation to the goods or services for which registration is sought, the context in which the term or phrase is being used or is intended to be used on or in connection with those goods or services, and the impact that it is likely to make on the average purchaser of such goods or services.”); *In re Bright-Crest, Ltd.*, 204 U.S.P.Q. 591, 593 (TTAB 1979) (“the fact that a term may have meanings other than the one the Board is concerned with is not controlling on the question [of distinctiveness]”).

Applicant offers no alternative to the robust evidence offered by AMM of the meaning of “get ordained” in the claimed context of “*ordaining ministers*.” The closest it gets is George Freeman’s proposed definition of “get ordained” in the “general spiritual context”—a definition apparently concocted by him in order to avoid the plain linguistic meaning of “get ordained.” 62 TTABVUE 4, ¶¶ 16-17 (“In the general spiritual context, the words ‘get ordained’ refer to an individual’s recognition of a calling or motivation to fulfill a spiritual purpose. It is not an act that another person can perform for you, or a service that another can provide to you, but an act or recognition that occurs within oneself.”); *see also* 95 TTABVUE 7-8 (asserting without citation that “‘GET ORDAINED’ has multiple possible meanings in the context of religious

services,” yet offering no plausible such meanings). Yet Mr. Freeman himself admitted that people “looking to become a minister” understand “get ordained” to mean “get[ting] ordained to become a minister.” 79 TTABVUE 17:25-18:10. In other words, the evidence shows that in the specific context of ordaining ministers, “get ordained” means, quite literally, “get ordained to become a minister.” *Id.* “GET ORDAINED” is therefore generic for the claimed service of “ordaining ministers.”

B. Applicant Misapprehends the Test for Descriptiveness and Ignores the Evidence of Considerable Third-Party Descriptive Use

Even if “get” and “ordained” in combination amount to more than the sum of the generic parts, the combined phrase is, at best, merely descriptive. Applicant tries to avoid this necessary conclusion by misstating the test for descriptiveness. A mark need not literally describe a category of services to be descriptive, as Applicant suggests. 95 TTABVUE 20 (arguing that “get ordained” is not used or understood as the common name for a category of applied-for services). Instead, a mark is “is merely descriptive if it immediately conveys information concerning a quality or characteristic of the product or service.” *In re MBNA Am. Bank, N.A.*, 340 F.3d 1328, 1332 (Fed. Cir. 2003). “For example, if the mark signifies the nature of the goods or services, that mark is considered descriptive.” *Thoroughbred Legends, LLC v. The Walt Disney Co.*, No. 1:07-CV-1275-BBM, 2008 WL 616253, at *7 (N.D. Ga. Feb. 12, 2008) (citing cases). A mark is properly rejected as descriptive if it is descriptive for *any* of the services covered by the registration. *Empirical Fin. Servs. LLC*, No. 91203384 91204762 9, 2019 WL 4054846, at *10 (TTAB Aug. 26, 2019).

Descriptiveness, like genericness, “must be determined in relation to the specific goods or services for which the registration is sought.” *Id.* at 1335. This is only logical, as one of the purposes of the descriptiveness doctrine is to prevent harassing suits when a competitor uses the mark to describe its own goods or services. *See In Re Adenocyte LLC*, No. 87900765, 2020 WL 3027599, at *1 (Apr. 29, 2020). That is the exact danger here, where AMM and other online ordination providers routinely use the claimed mark to invite prospective ministers to obtain their

services, but risk facing harassing lawsuits from Applicant for using plain descriptive language to do so.

Because descriptiveness is determined by looking at the claimed services, the Federal Circuit in *In re MBNA America Bank, N.A.* affirmed a Board finding that claimed marks “MONTANA SERIES” and “PHILADELPHIA CARD” were merely descriptive of a significant feature of the applicant’s affinity credit card services, explaining that the regional designations in the marks merely described a feature of the claimed services. *Id.* at 1334. The Court noted that these marks could be distinctive in another context, for instance, if used for purely financial services, rather than for affinity credit card services featuring specific regional affiliations. *Id.* However, the applications expressly recited the geographical affinity of the credit card services sought to be covered by the mark. *Id.*

This case is similar: Applicant’s claimed mark is clearly distinctive in the context of one of its claimed services. Applicant’s analysis of AMM’s descriptiveness claim curiously ignores the language in its own registration, even though descriptiveness must be analyzed “in relation to the goods or [services] for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods [or services] because of the manner of its use or intended use.” *In re Bayer AG*, 488 F.3d 960, 82 U.S.P.Q.2d 1828, 1831 (Fed. Cir. 2007) In its trademark application, Applicant describes its goods or services as “[e]cclesiastical services, *namely, ordaining ministers* to perform religious ceremonies.” 39 TTABVUE 33. “GET ORDAINED,” even if arbitrary in some contexts, is not arbitrary in the context of “ordaining ministers.” Instead, it immediately conveys information about a feature of the claimed service: that the claimed service enables an individual to, quite literally, *get ordained*.

Applicant attempts to distinguish “an act undertaken by an individual” and a “service provided by an organization,” arguing repeatedly that “GET ORDAINED” describes the former but not the latter. 95 TTABVUE 18, 20, 29. However, even if true, this is a distinction without a difference. A phrase may be descriptive if it references an act undertaken by an individual using

the product or service. For instance, “BREAK & BAKE” refers to the act undertaken by a consumer of frozen cookie dough; the cookie dough company does not engage in the breaking and baking of the Cookie dough. Though the term describes what must be done to the product by the consumer, rather than literally describing a feature of the product itself, the term is merely descriptive, not suggestive. *J & J Snack Foods, Corp. v. Earthgrains Co.*, 220 F. Supp. 2d 358, 377-380 (D.N.J. 2002). Similarly, an individual undertakes the act of getting ordained by availing herself of the ordination services provided by a religious organization. Even though it is the consumer of the ordination services who “gets ordained,” rather than the religious organization “getting ordained,” no imagination is required to connect the phrase “get ordained” to the services offered by the religious organization.² *See also Reserve Media, Inc. v. Efficient Frontiers, Inc.*, No. CV1505072DDPAGRX, 2017 WL 123420, at *4 (C.D. Cal. Jan. 11, 2017). (“RESERVE IT” is merely descriptive because “an entirely unimaginative, literal-minded person would understand . . . that RESERVE IT is software that enables consumers to make dining reservations”).

In addressing AMM’s evidence that the claimed mark is descriptive, Applicant conspicuously avoids AMM’s evidence of descriptive uses of “GET ORDAINED” by competitors, third parties, and Applicant itself. *Compare* 95 TTABVUE 27-30 to 88 TTABVUE 19-31, 41 (and record cites included therein). This considerable evidence is of types routinely accepted by the Board as evidence of descriptiveness, and it proves that “GET ORDAINED” is merely descriptive to the relevant public: consumers of ordination services. *See In re Bayer* 488 F.3d 960 at 964 (competent sources include dictionary definitions, trade journals, newspapers, webpages, story excerpts, and other publications); *Empirical Fin. Servs. LLC*, No. 91203384 91204762 9, 2019 WL 4054846, at *9 (relevant evidence includes “purchaser testimony,

² Applicant’s argument that it “takes some thought or inference to relate” the act of getting ordained as a minister to the service of ordaining ministers (*see* 95 TTABVUE 30) stretches credulity. And contrary to Applicant’s suggestion, the fact that the PTO has, in some instances, allowed registration of “GET ____” phrases in no way proves that “GET ORDAINED” is inherently distinctive for the service of enabling people to get ordained.

consumer surveys, listing in dictionaries, trade journals, newspapers, and other publications[,] . . . websites, publications and use in labels, packages, or in advertising material directed to the goods or services.”); *see also In Re Murray*, No. SERIAL 77029078, 2009 WL 1017267, at *4 (Mar. 26, 2009) (noting that Google hit list evidence persuasively demonstrated the existence of widespread use in the relevant industry of the claimed term).

C. Applicant Blatantly Ignores the Evidence Against Acquired Distinctiveness.³

Applicant cannot deny that third parties also use the term “GET ORDAINED.” Though Applicant tries to discount, exclude, or ignore this evidence, Applicant’s non-exclusive use of “GET ORDAINED” is insufficient to establish secondary meaning for this highly descriptive phrase. *See In re Louisiana Fish Fry Prod., Ltd.*, 797 F.3d 1332, 1337 (Fed. Cir. 2015) (noting that for a highly descriptive mark, the Board has the discretion not to accept even evidence of substantially *exclusive* and continuous use as prima facie evidence of acquired distinctiveness).

The one case cited by Applicant in support of its argument that use need not be exclusive to establish secondary meaning, *The Nestle Company, Inc. v. Joyva Corp.*, does not actually answer the question of what degree of third party use is required to prevent a term from attaining secondary meaning. 227 U.S.P.Q. 477, *2 (T.T.A.B. Sept. 26, 1985). Instead, that case cites to another case in which a registrant’s use was plainly “on a much wider scale than all uses of the term by others combined.” *See Goodyear Tire & Rubber Co. v. H. Rosenthal Co.*, 246 F. Supp. 724, 729 (D. Minn. 1965).

The facts are very different here. AMM produced considerable evidence of third-party uses of “GET ORDAINED” in the same or similar contexts to which Applicant uses the phrase. *See, e.g.*, 74 TTABVue 65:4-66:13 (Yoshioka: multiple ordination providers use “GET ORDAINED” on their websites’ homepages and navigation panels).

³ Applicant does not dispute that it did not assert secondary meaning as an affirmative defense in this case. Due to Applicant’s decision not to assert the issue as a defense, AMM declined to pursue discovery on the issue. For instance, AMM perceived no reason to engage a secondary meaning expert to conduct a secondary meaning survey until the Board’s summary judgment ruling, which was made after the close of discovery.

Applicant claims to have produced evidence of “substantial sales of goods or services in connection with the applied-for mark,” 95 TTABVUE 31, but its evidence is insufficient to show that its sales or advertising using the mark are actually “substantial” compared to sales or advertising by any of its competitors in the industry. *See In Re Hikari Sales Usa, Inc.*, No. 86439012, 2019 WL 1453259, at *20 (TTAB Mar. 29, 2019).⁴ To the extent the record offers any comparison, it in fact suggests the opposite: that Applicant’s sales and advertising efforts are not comparatively substantial. The record shows that AMM has consistently ordained more ministers through its website than Applicant has through GetOrdained.org. *Compare* 72 TTABVUE 54:14-20 *to* 73 TTABVUE 44:22-45:8; *compare* 63 TTABVUE ¶ 25 *to* 73 TTABVUE 42:16-43:4, 46:22-48:15. AMM additionally produced evidence that AMM uses “GET ORDAINED” “in pretty much all of [its] advertising” and has been using the phrase in paid advertising “for well over a decade.” 74 TTABVUE 32-33. In other words, Applicant’s use of “GET ORDAINED” is far from substantially exclusive.

D. Applicant Cannot Show that GET ORDAINED, Standing Alone, is a Source Indicator.

Applicant’s own evidence confirms AMM’s essential point: that “GET ORDAINED” is not itself a source identifier and it therefore does not act as a mark. Indeed, the evidence shows that even Applicant does not rely on “GET ORDAINED” to be a standalone source indicator. Instead, Applicant typically pairs the phrase “GET ORDAINED” with the name “UNIVERSAL LIFE CHURCH.” This combined five-word phrase may (perhaps) serve a source-identifying function, but the two-word subpart “GET ORDAINED” does not.

Applicant identifies in its brief a variety of ways in which it uses the claimed “GET ORDAINED” mark, in stylized and non-stylized form. *See* 95 TTABVUE 11-12, 34. These examples prove that Applicant does not actually rely on “GET ORDAINED” as a standalone source identifier. Instead, the contact information provided in the footer of the webpages on the GetOrdained.org website identifies either “Get Ordained™/Universal Life Church” or “Get Ordained/Universal Life Church.” 65 TTABVUE 7-8, 10-11. The “About” page on the

GetOrdained.org website specifies that “Get Ordained™ ordinations are processed by Universal Life Church Ministries. 65 TTABVUE 10-11. And Applicant’s stylized logo, appearing on the top and bottom of its GetOrdained.org webpages, includes “GET ORDAINED” as well as “UNIVERSAL LIFE CHURCH.”⁴ 65 TTABVUE 7-8, 10. Further, other evidence of record shows that Applicant uses “UNIVERSAL LIFE CHURCH” in conjunction with “GET ORDAINED” in its website metadata and paid Google advertising. *E.g.*, 74 TTABVUE 219 (Yoshioka Dep. Ex. 27: “Get Ordained with the Universal Life Church” and “Get Ordained – Universal Life Church”). Applicant does not even attempt to address the influence of its inclusion of “UNIVERSAL LIFE CHURCH” on the evidence it offered in support of registration of the claimed mark. The Board must consider this influence, as Applicant seeks not to register the five-word phrase it typically uses, but rather just the two-word subpart: “GET ORDAINED.” This is particularly vital when considering whether the mark acquired distinctiveness, as there is no evidence addressing whether consumers regard “GET ORDAINED” as distinctive when not coupled with “UNIVERSAL LIFE CHURCH.”⁵

Evidence of uses of the phrase by parties other than Applicant confirms that “GET ORDAINED” is used as a common message encouraging consumers to “get ordained.” It does not identify one particular source of services, but instead refers to ordination services more generally. For instance, third-party wedding planning website Ever After Guide writes, in an article about getting ordained to officiate a friend’s or relative’s wedding, that “you can get ordained by a religious organization,” before proceeding to name both Applicant and AMM as organizations that provide ordination services. 43 TTABVUE 337-46 at 340; *see also* 40 TTABVUE 17-25 (wedding planning website The Knot identifying American Fellowship

⁴ Applicant’s argument about use of a word mark in stylized or non-stylized form is a red herring. AMM does not contend, as Applicant suggests, that stylized uses cannot be trademark uses. To the contrary, Applicant may conceivably be entitled to a design mark for its logo even though some of the words contained therein are insufficiently distinctive to qualify for a word mark.

⁵ As referenced above, Applicant did not plead acquired distinctiveness so AMM had no opportunity to pursue discovery on this issue.

Church, Universal Life Church, Universal Ministries, and Rose Ministries as providers of ordination services). Similarly, the news site Bustle.com identifies, in an article titled “How to Legally Get Ordained to Perform a Wedding,” both Applicant and AMM as organizations who “will ordain people who want to perform a marriage ceremony.” 40 TTABVUE 11-16 at 14; see also 40 TTABVUE 26-33 (Lincoln Journal Star news article titled “Go online, get ordained” identifying sources of ordination services besides GetOrdained.org). In other words, these third-party sources do not rely on “GET ORDAINED” as a source-identifier; instead, they convey an informational message about services that allow a person to “get ordained.” Terms and expressions that merely convey an informational message are not registrable. *In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010).

E. Other "GET ____" Marks not Dispositive

Applicant devotes a considerable portion of its brief to identifying other “GET ____” marks that have apparently achieved registration, but Applicant articulates no reason why its proffered examples of registration of those marks are entitled to any more than the “scant probative value” ascribed to third-party registrations in other cases. *See In Re Volvo Cars of N. Am. Inc.*, 46 U.S.P.Q.2d 1455 n. 2 (T.T.A.B. June 3, 1998).

Nearly all of the marks cited are more distinctive for the claimed goods or services than the Applicant’s mark. In most cases, the description of the claimed goods or services does not contain the second component word, in striking contrast to Applicant’s attempt to register “GET ORDAINED” for the service of “*ordaining* ministers.” Moreover, in all the third-party examples Applicant identifies, the marks could reasonably be connected with many different goods or services. For example, “GET LATHERED” could be associated with a pet grooming salon or a beauty salon, not just “skin soap.” “GET CONNECTED” could cover a host of goods and services, and indeed, that very trademark (with no stylization) is registered to five different owners covering different goods or services, some within the same class. In some of Applicant’s cited cases, the marks are so far removed from the common definition of the word that Applicant needed to include an asterisk to explain the connection between the word and the services. *See*

95 TTABVue 13-16 (footnotes 4-6). Even the one cited registration that seems most akin to GET ORDAINED, a mark that can reasonably refer only to one act (the act of becoming a minister), is distinguishable. That registration, for GET VERIFIED, is registered *on the Supplemental Register*, a nod to the mark's descriptiveness. Of course, left off Applicant's list of "GET ____" marks are all the failed applications for such marks.⁶

Applicant's heavy reliance on registration of these other marks also ignores the plain truth that the existence of the *inter partes* review process proves that Examiner decisions about registration are not infallible. One purpose of the *inter partes* review process is to bring to the attention of the USPTO evidence bearing on registration decisions that may have been missed by the Examining Attorney, so that improper registrations may be corrected and the integrity of the trademark register can be maintained. This case is just one such example.

IV. CONCLUSION

For these reasons, and those set out in AMM's opening trial brief, the phrase "GET ORDAINED" cannot be registered as a trademark for a service that literally enables individuals to get ordained.

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Respectfully submitted,

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⁶ The Board can take judicial notice of these failed applications, which can easily be located on TESS, and which include: GET INFORMED (Abandoned Serial No. 87891101), covering "Digital advertising services; Promoting the goods and services of others by online distribution of video content,"; GET MAIL (Abandoned Serial No. 78161611), covering, "software for cellular e-mail"; GET MINKED (Abandoned Serial No. 86121197), covering, "Artificial eyelashes; False eyelashes"; GET MAPPED (Abandoned Serial No. 78889672), covering (in part), "advertising agency services"; and GET MOTIVATION (Abandoned Serial No. 88863588), covering artists supplies. These claimed marks were all deemed incapable of functioning as a trademark because they were either merely descriptive or incapable of identifying one particular owner.

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APPENDIX A

Applicant's Appendix containing alleged evidentiary objections contains multiple legal and factual errors.

Initially, Applicant is incorrect regarding AMM allegedly "sandbagging" Applicant with previously undisclosed evidence. Though Applicant (perhaps deliberately) fails to go into any detail about any particular piece of evidence, it contends that Exhibits 1-21, 23-25 to the Wall Deposition, Exhibits 26-46 to the Yoshioka Deposition, and Exhibits 47-49, 100-03 to the King Depositions should be excluded as not timely produced. Applicant's objections ignore the fact that most of this evidence was previously submitted with the Stephens and Wall Declarations during dispositive motions briefing (*e.g.*, 7 TTABVUE 4-46, 21 TTABVUE 17-93, 33 TTABVUE 10-152). For example, Wall Trial Exhibit 1 appeared as Exhibit 6b to Mr. Wall's declaration in support of Opposer's Reply to Applicant's Opposition to Opposer's Motion for Summary Judgment. Meanwhile, Wall Trial Exhibits 2 and 3 previously appeared as exhibits to the declaration of Nancy Stephens in support of Opposer's Motion for Summary Judgment. And Wall Trial Exhibit 24 was produced in the course of discovery as Bates number AMM 754.

To the extent that new versions of these documents were used instead of the exact versions previously submitted, the new versions were created in response to objections previously raised by Applicant during dispositive motions briefing, for instance, to cure objections to completeness or lack of self-authentication. It is proper for AMM to submit "new" versions of its evidence to overcome curable objections raised by Applicant, not grounds for exclusion. *See, e.g., Florists' Transworld Delivery, Inc.*, No. CANCELLATION 29,650, 2001 WL 245748, at *2 (Feb. 9, 2001). Having made curable objections, Applicant cannot now prevent AMM from overcoming those objections by offering different, cured versions of that evidence.

Further, none of the cases cited by Applicant are applicable to the current procedural status. In the cases cited by Applicant, the challenged evidence was produced after discovery and

after depositions. In this case, all the evidence was, at the latest, produced during depositions. Applicant had—and took—the opportunity to cross-examine the witnesses with the documents during their depositions. *See, e.g.*, 69 TTABVUE 157-185. Applicant also had the opportunity, and again in many cases took the opportunity, to use the exhibits during Applicant’s testimony depositions. For instance, after cross-examining Mr. Wall on his trial exhibits at a testimony deposition taken during AMM’s case-in-chief, Applicant again questioned Mr. Wall on these exhibits during Applicant’s testimony deposition of Wall taken *four months* after AMM’s testimony deposition of Mr. Wall. *See* 90 TTABVUE 10-34. Applicant should be equitably estopped from asserting objections to these exhibits in light of its own use of the exhibits during its case-in-chief testimony depositions. Its opportunity to use, and actual use, of these exhibits proves that Applicant was not prejudiced by their use during AMM’s case-in-chief.

Applicant’s claims regarding authentication are also not well founded. Applicant does not cite to applicable case law supporting exclusion based on Applicant’s authentication objections. Applicant’s argument is based instead, without support, on hyper-technical issues such as knowledge (or lack of knowledge) as to the “exact date” of creation of a document—a detail that is simply not a real requirement for proper authentication. *See, e.g., Ideal Elec. Co. v. Flowserve Corp.*, No. CVS021092DAELRL, 2006 WL 8441868, at *1 (D. Nev. Sept. 21, 2006). Applicant also selectively cites to certain allegedly problematic exhibits and the testimony offered to authenticate them, while ignoring other exhibits and testimony that do not fit Applicant’s narrative. While the witnesses may not have had a perfect recall of every detail that Applicant wishes to make a requirement, they sufficiently authenticated all, or nearly all, the exhibits.⁷

Applicant also makes unfounded, unsupported hearsay objections. For instance, the automatically-generated Google use data to which Applicant objects is not hearsay, but rather a machine-generated snapshot in time of Google usage trends. Definitionally, hearsay requires a declarant making a statement; machine-generated records are not hearsay. *See, e.g., United States v.*

⁷ Applicant also failed to make some of its objections at the time of the testimony deposition, thereby depriving AMM of the required opportunity to cure any curable issues.

Channon, 881 F.3d 806, 811 (10th Cir. 2018) (machine-generated transaction records in Excel spreadsheets not hearsay); *United States v. Lizarraga-Tirado*, 789 F.3d 1107, 1109–10 (9th Cir. 2015) (a Google Earth “tack” placed at labeled GPS coordinates not hearsay); *United States v. Lamons*, 532 F.3d 1251, 1263–64 (11th Cir. 2008) (machine-generated data collected from calls made at airline’s corporate toll-free number not hearsay for Confrontation Clause purposes); *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003) (header information generated by fax machine not a hearsay statement because it is not “uttered by ‘a person’ [and] nothing ‘said’ by a machine ... is hearsay”).

As for statements made to Mr. King by other ministers or prospective ministers, Applicant is incorrect that such statements are hearsay. The truth value underlying the statements in question is immaterial; what matters is that the statements were made to Mr. King—a matter to which he can testify based on his personal experience interacting with these individuals. If the Board nevertheless concludes that statements made to Mr. King (or Mr. Wall or Mr. Yoshioka) do constitute hearsay, AMM asks that the Board treat analogous testimony offered by Mr. Freeman, Mr. Goschie, or Mr. Wozeniak be treated the same; after all, Applicant’s witnesses, like AMM’s, offered testimony as to what they were or were not told by actual and prospective ministers.

Applicant’s objections based on alleged improper opinion testimony are also without merit. First, Applicant did not preserve these objections by raising them at the time of the depositions. Second, some of the testimony Applicant cites in its objections, namely, sections of Mr. Yoshioka’s testimony, were elicited *by Applicant*. If Applicant felt that Mr. Yoshioka was unqualified to testify, it should not have asked Mr. Yoshioka to opine on those issues. Third, Mr. King’s and Mr. Yoshioka’s opinions do not actually constitute expert testimony, as Applicant claims. *See Open Text S.A. v. Box, Inc.*, No. 13-CV-04910-JD, 2015 WL 393858, at *7 (N.D. Cal. Jan. 29, 2015) (“just because the underlying facts and data are technical in nature does not transform the information into ‘expert testimony’ when those facts are within the personal knowledge and experience of the company’s employee.”); *In re Google AdWords Litig.*, No. 5:08–CV–3369 EJD, 2012 WL 28068, at *5 (N.D. Cal. Jan. 5, 2012) (collecting cases and permitting lay witness to testify on what Google

AdWords “does when certain variables are changed”). Fed. R. Evid. 701 specifically allows opinion testimony from a lay witness. The comments to Rule 701 specifically observe that opinion testimony is allowable when it based on “knowledge and participation in the day-to-day affairs of the business.” Both Mr. King and Mr. Yoshioka adequately laid the foundation showing that their testimony was based on their day-to-day experience at AMM.

Finally, even setting aside all of the above, Applicant does not meet its burden to prove the evidence should be excluded. Applicant never identifies where it requested the supposedly-withheld documents or expert disclosures for the evidence it now seeks to exclude. Without that showing, it would be “unduly harsh” to exclude any evidence. *See, e.g., Vignette Corp. v. Marino*, 77 U.S.P.Q.2d 1408, 1411 (TTAB 2005) (finding it “unduly harsh” to exclude evidence where the party presenting the evidence “did not unequivocally refuse to provide the requested information”). Additionally, even the cases cited by Applicant mention that exclusion should be an “extraordinary” remedy, not the usual course that Applicant argues it should be. *New World Sols., Inc. v. NameMedia Inc.*, 150 F. Supp. 3d 287, 306 (S.D.N.Y. 2015) (“[P]recluding evidence is a “drastic remedy” that “should be exercised with caution”). The Board is competent to weigh the evidence of record appropriately, so the need to exclude evidence in Board proceedings is minimal. *See Glow Concept Inc., No. CANCELLATION 9206714*, 2020 WL 6638730, at *1 (Nov. 2, 2020); *Hanscomb Consulting, Inc., No. CONCURRENT USE 94002*, 2020 WL 973180, at *3 (Feb. 26, 2020).

For these reasons, Applicant’s objections should be overruled.